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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, as Attorney General of the State of New York,

Appellants,

-v.-

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

# JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED

Does a state statute, which authorizes pretrial detention of juveniles upon a statement of facts and reasons of an appropriate court demonstrating that, unless the juvenile is detained, there is a serious risk that he may do an act which if committed by an adult would constitute a crime, comport with the Due Process Clause of the 14th Amendment of the United States Constitution?

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# JURISDICTIONAL STATEMENT

## STATEMENT

Appellant Ellen Schall, the Commissioner of the New York City Department of Juvenile Justice, appeals from a judgment of the United States Court of Appeals for the Second Circuit, dated September 20,

1982, which affirmed a judgment of the United States District Court for the Southern District of New York (Carter, D.J.), entered June 1, 1981, which, inter alia, adjudged that section 739 (a)(ii) of the New York Family Court Act, which authorizes under stated conditions the pretrial detention of juveniles, "is unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States".

## OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Carter, D.J.), which appears in the Appendix at page 32a, is reported sub. nom. United States ex rel. Martin v.

Strasburg at 513 F. Supp. 681.*

The opinion of the United States Court of Appeals for the Second Circuit, which appears in the Appendix at page 1a, is reported sub. nom. Martin v. Strasburg at 689 F. 2d 365.

## JURISDICTION

Alleging the constitutional invalidity of New York Family Court Act, section 739(a)(ii), appellees sought a writ of habeas corpus and a declaratory judgment pursuant to 28 U.S.C., sections 2241 et seq.; 28 U.S.C., section 2201; and Rule 57 of the Federal Rules of Civil Procedure.

*An earlier decision of the District Court denying a motion to dismiss for failure to exhaust state remedies and certifying the matter as a class action, which is dated April 3, 1978 and appears in the Appendix at page 89a, is unreported.

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 20, 1982. A notice of appeal to this Court on behalf of the Commissioner of the New York City Department of Juvenile Justice was filed in the Court of Appeals on December 3, 1982.

This appeal is being docketed in this Court pursuant to an order of Justice Marshall, dated December 10, 1982, granting an extension of time to January 23, 1983 to docket the appeal.* The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(2).

## RELEVANT STATUTE

New York Family Court Act, section 739 (Book 29A, Part 1, Judiciary - Court Acts - Family Court [McKinney's Consolidated Laws of New York, Supplementary Pamphlet 1976 to 1982])

*Since January 23 is a Sunday, this Jurisdictional Statement is being served and mailed to the Court on Monday, January 24.

"§739. Release or detention after filing of a petition and prior to order of disposition

"(a) After the filing of a petition under section seven hundred thirty-one [Originating juvenile delinquency proceeding] or seven hundred thirty-two [Originating proceeding to adjudicate need for supervision], the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:

"(i) there is a substantial probability that he will not appear in court on the return date; or

"(ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

"(b) Unless the respondent waives a determination that probable cause exists to believe that he is a juvenile delinquent or a person in need of supervision, no detention under this section may last more than three days (i) unless the court finds, pursuant to the evidentiary

standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays."

## STATEMENT OF THE CASE

### Prior State Court Determination

In a prior, unrelated State habeas corpus proceeding, the petitioner, represented by the same attorney who, with others, represents petitioners in this action, challenged the precise section here in question (FCA, § 739[a][ii], then § 739[b]) on the same grounds as those raised by petitioners herein. The Court of Appeals of the State of New York determined that "the provisions for pre-trial detention of a youth charged as a juvenile delinquent ... do not offend either the equal pro-

tection or the due process constitutional mandates". People ex rel. Wayburn (Charles L.) v. Schupf, 39 NY 2d 682, 385 N.Y.S. 2d 518, 522, 350 N.E. 2d 906, 911 (1976). No appeal was taken to this Court from that determination. See 28 U.S.C., § 1257(2).

Proceedings Below

This action was commenced in the United States District Court for the Southern District of New York by three juveniles (hereinafter, "the petitioners"), on behalf of themselves and all others similarly situated, for a writ of habeas corpus and a declaratory judgment. Petitioners alleged that since section 739(a)(ii) of the New York Family Court Act (hereinafter, "FCA") violates the Due Process and Equal Protection Clauses of the 14th Amendment of the United States Consti-

tution, their pretrial detentions pursuant to that statute were unlawful. The action was originally commenced against the Director of Detention Services of the New York City Human Resources Administration, the official then having custody of petitioners. By stipulation of the parties, the Commissioner of the New York City Department of Juvenile Justice was substituted as respondent when that Department assumed responsibility for, inter alia, juvenile pretrial detainees.* The Attorney General of the State of New York intervened pursuant to his obligation to support the constitutionality of a State statute. New York Executive Law, § 71 (Book 18, McKinney's Con.

*Ellen Schall was appointed Commissioner of the New York City Department of Juvenile Justice on January 20, 1983. She has therefore been substituted in the caption for the former Commissioner, Paul Strasburg. See Rule 40.3 of the Rules of this Court.

Laws of N.Y.).

On petitioners' motion, the District Court certified the action as a class action, defining the class as "all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) of the [Family Court] Act". App., p. 101a. Following a trial on the merits, the District Court, in a judgment entered June 1, 1981, declared FCA, section 739(a)(ii), "unconstitutional, both on its face and as applied, in that it contravenes the rights of petitioners and the class they represent to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States". The Court also granted writs of habeas corpus, ordering that "all members in [the respondent Commissioner's] custody pursuant to Family Court Act Section 739

(a)(ii) shall be released forthwith".* App., pp. 30a-31a.

In its opinion, the District Court concluded that petitioners' equal protection challenge to the statute in question was "insubstantial". App., p. 63a. Since petitioners did not challenge that finding in the Court of Appeals, the issue was not presented to that Court for its review. The District Court, however, did find that FCA, section 739(a)(ii), violates the

*The class action certification precludes a determination that the instant appeal is moot. In a post-judgment clarifying memorandum to all counsel, the District Court explained that "[the] writ reaches all detained juveniles held under the relevant act until this proceeding is concluded or the judgment entered reversed". Appellant Schall continues to release any juvenile remanded into her custody pursuant to FCA, section 739(a)(ii). See Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975); United States v. Edwards, 430 A. 2d 1321, 1324 n. 2 (D.C.App. 1981)(en banc), cert. denied, ___ U.S. ___, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Due Process Clause of the 14th Amendment in that (App., p. 65a):

> "(1) it gives the judge a license to act arbitrarily and capriciously in a § 739 prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process, and (3) in addition, constitutes punishment that is constitutionally impermissible under the due process clause."

Upon the appeals of the Commissioner and the Attorney General to the Court of Appeals, only the District Court's finding that FCA, section 739(a)(ii), violated the Due Process Clause was presented for review. The Court of Appeals declined to reach the issue of whether pretrial detention of juveniles to prevent future crimes, per se, is constitutional, holding only that section 739(a)(ii) "does not accord procedural due process"

(App., p. 4a) since it "is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts". App., p. 17a.

Finding that over two-thirds of the detainees under section 739(a)(ii) are either "not ... adjudicated guilty or [are] not ... sentenced to confinement after an adjudication of guilt" (App. p. 21a), the Court determined that the statute has "an unconstitutional impact as to the vast majority of the juveniles detained under it" (App., p. 19a) since such detentions "involve either mistakes in judgment fostered by 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes". App., pp. 18a-19a. Having so found, the Court held that FCA, section 739(a)(ii), is unconstitutional as to all juveniles. App., p. 20a.

Judge Newman, concurring only in the result, was "less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment". App., pp. 23a-24a. In Judge Newman's view, "the statute denies due process ... not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results". App., p. 24a. The Judge proceeded to list five "readily available limitations that would reduce the risk of error" which were not included in section 739(a)(ii). App., pp. 27a.

Brief Summary of Statutory Scheme - Proceedings Concerning Juvenile Delinquents

A person under the age of 16 may be taken into custody by a police of-

ficer or a peace officer for committing an act which, if done by an adult, would constitute a crime.* FCA, § 721. While release of the juvenile to his parents or other legal custodian is preferred, the officer may also question him "for a reasonable period of time" or take him to a juvenile detention facility. FCA, § 724; see FCA, § 712(c, d, e). In the latter instance, a facility is authorized to release the juvenile to his parents or other legal guardian "unless there are special circumstances requiring his detention". FCA, § 727(b). If a child continues to be detained,

*A "juvenile delinquent" is a person over seven and less than 15 years of age who, having done an act that would constitute a crime, is not criminally responsible for such conduct by reason of infancy. FCA, § 712(a).

A "crime" is defined in New York Penal Law, section 10.00(6) (Book 39, McKinney's Con. Laws of N.Y.), as a felony or a misdemeanor.

he must be brought before a judge of the Family Court within 72 hours (FCA, § 729), at which time the Court holds a hearing "for the purpose of making a preliminary determination of whether the court appears to have jurisdiction over the child". The child is advised of his rights to remain silent, have counsel of his own choosing, and have a law guardian assigned. Unless certain specified findings are made, the child is released to his parents or other legal custodian. FCA, § 728.

Prior to the filing of a petition, the probation service is authorized to confer with the juvenile, the person seeking to file the petition, and other interested persons "concerning the advisability of filing a petition". FCA, § 734(a)(i). With certain statutory exceptions, probation may then attempt to "adjust" the case before

the filing of the petition. FCA, § 734 (a)(ii).*

A juvenile delinquency proceeding originates with the filing of a petition which alleges that a child under 16 years of age committed an act which, if done by an adult, would constitute a crime and that the child requires "supervision, treatment, or confinement". FCA, § 731(1); see FCA, § 733. According to the testimony at trial of a judge of the Family Court, if the petition is made on information and

*According to a Vera Institute of Justice Study of a New York City sample of 1890 potential delinquency cases, admitted into evidence at trial, 532 (28 percent) were adjusted informally at probation intake.

Witnesses testified that a case may be "terminated without adjustment" if a complaining witness fails to appear, has not signed a direct knowledge statement in support of the petition, or advises probation he does not want to proceed. Approximately 22 percent of the cases in the Vera Study were so terminated.

belief, it must be supported by an affidavit from someone (i.e., the victim or a witness) with direct knowledge of the incident who indicates that he has read the petition and that it is true. The petition must be approved by the appropriate corporation counsel, county attorney, or district attorney. FCA, § 734-a.

After the filing of the petition, "the court may release the [juvenile] or direct his detention". FCA, § 739(a). Such a determination is made at a hearing at which the juvenile is advised of his rights to remain silent, to be represented by counsel of his or his parents' choosing, and to be assigned a law guardian. FCA, § 741(a). At the conclusion of the hearing, the Court must order the juvenile released if it cannot state "facts and reasons" for finding that, "unless the [juvenile] is detained:

(i) there is a substantial probability that he will not appear in court on the return date [of the fact-finding hearing]; or (ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime."* FCA, § 739(a). It is this latter provision which is challenged by petitioners and which was held invalid by the Courts below. Section 739(a)(i), providing for detention upon a finding of probability of flight, is not affected by the instant proceeding. The "739 hearing" will be discussed in more detail in the following section of this Statement.

The next stage in the judicial process is the fact-finding hearing, which

*According to the trial testimony of the Family Court judge, probation service, based on its contact with the juvenile during the adjustment ("pre-petition") stage of the proceeding, makes a recommendation as to whether the child ought to be released or detained.

must occur not more than three days after the filing of the petition if the juvenile is in detention.* FCA, § 747. The purpose of this hearing is to determine whether the juvenile "did the act or acts alleged in the petition which, if done by an adult, would constitute a crime". FCA, § 712(f). Only evidence that is "competent, material and relevant" may be admitted at the fact-finding hearing, and any determination that the child did the acts complained of must be based upon proof beyond a reasonable doubt. FCA, § 744(a, b); see FCA, §§ 751, 752.** If

*If the act involved would be a class A, B, or C felony if committed by an adult, the fact-finding hearing may commence no later than 14 days after the filing of the petition. FCA, § 747.

**Upon or after a fact-finding hearing, the Family Court may order that the proceeding be "'adjourned in contemplation of dismissal'", an adjournment, upon conditions, for a period not to exceed six months "with a view to ultimate dismissal of the petition in furtherance of justice". FCA, § 749(a).

the fact-finding hearing is adjourned (FCA, § 748), a detention may not last more than three days

> "(i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that ... probable cause exists [to believe the child is a juvenile delinquent], or (ii) unless special circumstances exist, in which cases such detention may be extended not more than three additional days exclusive of Saturdays, Sundays and public holidays."*

FCA, § 739(b); see People ex rel. Guggenheim (Robert P.) v. Mucci, 32 NY 2d 307, 344 N.Y.S. 2d 944, 298 N.E. 2d 109 (1973).

Following a finding that the child committed the alleged acts, the Court holds a dispositional hearing

*The initial three day detention period is inclusive of Saturdays, Sundays, and public holidays. Matter of Kenneth D., 102 Misc 2d 363, 423 N.Y.S. 2d 423 (Fam. Ct., Kings Co. 1979).

(FCA, § 746[a]), the purpose of which is to determine whether the child requires supervision, treatment, or confinement. FCA, § 712(g). Only evidence that is material and relevant may be admitted, and an adjudication must be based on a preponderance of the evidence. FCA, § 745. Upon a finding that supervision, treatment, or confinement is necessary, an adjudication of juvenile delinquency is made, and the Court enters an appropriate order of disposition. See FCA, § 753.* **

*Throughout the sections referred to, the Family Court Act makes special provisions for "designated felony acts", i.e., acts which, if done by an adult, would constitute certain designated serious crimes, e.g., murder, kidnapping, arson. FCA, § 712(h).

**On December 20, 1982, the Governor of New York signed a bill amending the Family Court Act. L. 1982, ch. 920, as amended by L. 1982, ch. 926. The statute, effective July 1, 1983, establishes a new Article of the Act,

(footnote cont'd on next page)

## THE QUESTION IS SUBSTANTIAL

SECTION 739(a)(ii) OF THE NEW YORK FAMILY COURT ACT, WHICH AUTHORIZES PREVENTIVE DETENTION OF JUVENILES UPON A STATEMENT OF FACTS AND REASONS BY THE FAMILY COURT, COMPORTS WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

(1)

This appeal provides this Court with an opportunity to address, at least in part, a question left open in Bell v.

** (footnote cont'd from previous page)

denominated "Juvenile Delinquency". The new Article will govern procedure in the Family Court regarding delinquency proceedings; Article 7, which until July 1 governs both delinquency proceedings and proceedings concerning persons in need of supervision, will thereafter cover only the latter.

The new statute contains a preventive detention section substantially identical, in relevant respects, to section 739(a)(ii). The standard for detention, "serious risk that [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime," remains the same.

Wolfish, 441 U.S. 520, 534 n. 15 (1979), that is, whether the governmental objective of protecting the community from crime may constitutionally justify the pretrial detention of juveniles.* The issue is one of critical public importance, pretrial detention being authorized by statute in a number of states. Indeed the very statute declared unconstitutional in the instant case has previously been sustained by the highest court of the State of New York. People ex rel. Wayburn (Charles L.) v. Schupf,

*As noted, petitioners' equal protection claim was rejected by the District Court, and it was neither raised in, nor decided by, the Court of Appeals. On this appeal, therefore, we do not address the issues, if any, raised by the fact that although New York does not provide for preventive detention of adults, FCA, section 739(a)(ii), authorizes such detention of juveniles. See People ex rel. Wayburn (Charles L.) v. Schupf, supra, 39 NY 2d 682, 385 N.Y.S. 2d at 520-521, 350 N.E. 2d at 908-910 (section 739[a][ii] does not violate the Equal Protection Clause of the 14th Amendment).

supra, 39 NY 2d 682, 385 N.Y.S. 2d 518, 350 N.E. 2d 906. Other courts have sustained the application of statutes permitting pretrial detention of juveniles for the protection of the community. L.O.W. v. District Court, 623 P. 2d 1253 (Colo. 1981) (child may be detained if it is "contrary to the welfare ... of the community to release the child from detention"); Morris v. D'Amario, 416 A. 2d 137 (R.I. 1980) (child can be removed from parents "when ... the safety and protection of the public cannot be adequately safeguarded without his removal").

In a case of first impression, a statute authorizing preventive detention for a maximum of 60 days of adult alleged offenders was sustained as against a constitutional challenge premised on the 5th and 8th Amendments of the United States Constitution. United States v. Edwards, 430 A. 2d 1321 (D.C.App. 1981)

(en banc), cert. denied, ___ U.S. ___, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982); see Parker v. Roth, 202 Neb. 850, 278 N.W. 2d 106, cert. denied, 444 U.S. 920 (1979).

In accord with the decisions cited, we submit that the Due Process Clause does not prohibit preventive detention of juveniles. See United States ex rel. Covington v. Coparo, 297 F. Supp. 203, 207 (S.D.N.Y. 1969) (writ of habeas corpus denied on ground state court reasonably found, inter alia, that the petitioner's release might constitute a danger to the community); cf. Campbell v. McGruder, 580 F. 2d 521, 527, 528 (D.C. Cir. 1978) ("[O]ur common law and constitutional heritage has refused to abjure the institution of pretrial detention.... '[T]he State's duty to control crime' ... justifies in the first instance the institution of

pretrial detention."). So long as a statute is carefully tailored with safeguards to protect the obvious liberty interest of the potential detainee (see, infra, pp. 27-37), the criminal justice system is sufficiently flexible to incorporate a community's legitimate concern for its safety and well-being. "[T]he sharp increase in crime and a desire to compensate for a seeming progressive breakdown of our law enforcement structure" (State v. Johnson, 61 N.J. 351, 294 A. 2d 245, 250 [1972]) are realities which are not ignored by the Constitution. While the Due Process Clause necessitates the structuring of a system such that the adverse effect of detention on the accused is not disproportionate to society's need for protection, such a system, we submit, is not precluded by the Clause in the first instance. See Note, Preventive Detention,

36 Geo. Wash. L. Rev. 178, 185-186 (1967); United States v. Edwards, supra, 430 A. 2d at 1331-1333 (pretrial preventive detention is regulatory, not penal, in nature).

(2)

In view of the fact that the New York Court of Appeals previously found the statute in question in all respects constitutional, and in light of the cases cited supra, page 24, sustaining preventive detention statutes, a substantial question for resolution by this Court is presented. As will be shown below, the procedural safeguards embodied in the New York Family Court Act satisfy the demands of due process, and the Court of Appeals erred in finding to the contrary.

A hearing pursuant to FCA, section 739(a), follows the filing of a petition which must either be on actual knowledge or supported by an affidavit of a person with knowledge attesting to the truth

of the allegations in the petition (JA: 532).* The decision to detain a juvenile pursuant to section 739(a)(ii) is made by the court, which must state the facts and reasons for the determination that "there is a serious risk that [the child] may before the return date [of the fact-finding hearing] do an act which if committed by an adult would constitute a crime". At the "739 hearing", the child is advised of his rights to remain silent, to be represented by counsel of his or his parents' choosing, and to be assigned a law guardian. FCA, § 741(a). A parent accompanying the child may be questioned regarding the behavior of the child at home, the relationship between the parent and the child, etc. (JA: 539). If a clergyman or social worker accompanies

*Numbers in parentheses preceded by "JA" are references to the Joint Appendix filed in the Court of Appeals.

the child, he may be given an opportunity to speak on the child's behalf (JA: 540). Probation, which has interviewed the juvenile and others during the intake procedure, will make a recommendation as to whether the juvenile ought to be released or detained (JA: 535). According to the testimony at trial of a Family Court judge, the factors which he and his colleagues utilize in determining whether release or detention is appropriate in a particular case include: the seriousness of the acts alleged in the petition; an evaluation, if possible, of the probability that the allegations will be sustained; the age of the victim; the time of day of the acts, indicating, perhaps, a lack of parental control; the juvenile's past record and the proximity in time of the present alleged acts to prior acts; any information developed at the hearing; and, the recommendation of

probation (JA: 549-555). This process ensures that the detention decision is made on an individual basis, supported by judicially reviewable stated facts and reasons. Compare, Huihui v. Shimoda, 644 P. 2d 968 (Ha. 1982) (denial of bail to particular class of offenders creates a conclusive presumption of dangerousness and thus violates state constitutional right to bail); In re William M., 3 Cal. 3d 16, 89 Cal. Rptr. 33, 473 P. 2d 737 (1970) (judicial decision to detain on grounds of dangerousness premised solely on act committed, without regard to individual factors involved, denies due process).

If a fact-finding hearing is not commenced within three days of the detention (inclusive of Saturdays, Sundays and public holidays) (FCA, § 747), even if the adjournment is requested by the child (People ex rel. Kaufman [Joseph P.] v. Davis, 57 AD 2d 597, 393 N.Y.S. 2d 746

[2d Dept. 1977]), there must be a hearing to determine whether there is probable cause to believe that the child is a juvenile delinquent (FCA, § 739[b]; see People ex rel. Guggenheim [Robert P.] v. Mucci, supra, 32 NY 2d 307, 344 N.Y.S. 2d 944, 298 N.E. 2d 109),* and whether there is good cause to continue the detention. Matter of Renaldo Q., 83 Misc 2d 945, 373 N.Y.S. 2d 993 (Fam. Ct., Bronx Co. 1975). Although hearsay is admissible, something more than uncorroborated hearsay must be presented before a finding of probable cause may be made. People ex rel. Guggenheim (Michael W.) v. Mucci, 46 AD 2d 683, 360 N.Y.S. 2d 71 (2d Dept.), aff'g 77 Misc 2d 41, 352 N.Y.S. 2d 561

*If "special circumstances" exist, the detention may be extended not more than three additional days, exclusive of Saturdays, Sundays, and public holidays. FCA, § 739(b).

(Sup. Ct., Kings Co. 1974).

"[D]ue process 'is flexible and calls for such procedural protections as the particular situation demands.'" Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979). In accord with the standards established in Gerstein v. Pugh, 420 U.S. 103 (1975), and balancing the liberty interests of the juveniles involved and society's interest in protecting itself against criminal acts, the procedures and standards established by the Family Court Act, as implemented by the Court (cf. Jurek v. Texas, 428 U.S. 262, 272-273 [1976] [relying on judicial construction of terms "criminal acts of violence" and "continuing threat to society" in statute defining when jury may impose death penalty]), fully comport with the Due Process Clause of the 14th Amendment. See Morris v. D'Amario, supra, 416 A. 2d at 141-142.

While we reject the conclusion of the Court of Appeals majority decision that "the record supports a conclusion of a significant number of instances where detention was imposed either mistakenly or for purposes of punishment" (see, App., pp. 23a-24a), we submit that even assuming a majority of detainees are not placed following a dispositional hearing, such a result does not mandate a finding of unconstitutionality. As properly stated by the New York Court of Appeals in sustaining FCA, section 739(a)(ii) (People ex rel. Wayburn [Charles L.] v. Schupf, supra, 39 NY 2d 682, 385 N.Y.S. 2d at 522, 350 N.E. 2d at 910):

> "[I]t must be apparent that there is a vastly different body of relevant data on which to make an informed determination as to the desirability of placement after the dispositional hearing. It should surprise no one that caution and concern for both the juvenile and society may indicate the

> more conservative decision to detain at the very outset, whereas the later development of very much more relevant information may prove that while a finding of delinquency was warranted, placement would not be indicated."

We add that, by statute, the applicable considerations are different at these distinct stages of a delinquency proceeding. At a "739 hearing", the statute requires that only the welfare of the community be considered, and the detention authorized is brief. At the dispositional phase, the court must consider not only "the need for protection of the community", but also "the needs and best interests of the [juvenile]". FCA, § 711; see JA: 591-593. That former detainees may not be placed following a dispositional hearing does not mean that due process has been denied; it is evidence, rather, that at the dispositional phase the system is, in fact, working.

Finally, assuming, as we do, that detention pursuant to FCA, section 739 (a)(ii), is otherwise constitutional, the fact that a judge is required to "predict" future behavior does not render the statute unconstitutional. As stated by the New York Court of Appeals (People ex rel. Wayburn [Charles L.] v. Schupf, supra, 39 NY 2d 682, 385 N.Y.S. 2d at 522, 350 N.E. 2d at 910):

> "Such an element is necessarily present in the administration of any bail system, in the imposition of alternatively available sentences, in the administration of a parole system, or in any other procedure in which discretionary authority for differing criminal dispositions is vested in a court or an administrative body."

The prediction of dangerousness is no more or less speculative than a prediction of flight, yet a determination that an accused may not appear for trial is recognized as a basis for denying bail. People ex rel. Weisenfeld

(Cifone) v. Warden, 37 NY 2d 760, 374 N.Y.S. 2d 631, 337 N.E. 2d 140 (1975); see Bell v. Wolfish, supra, 441 U.S. at 523. Indeed, a finding that a person poses a danger to the community can serve as a basis for denying bail pending appeal. Carbo v. United States, 82 S. Ct. 662, 666, 7 L. Ed. 2d 769 (1962) (Douglas, Circuit Justice); Leigh v. United States, 82 S. Ct. 994, 996, 8 L. Ed. 2d 269 (1962) (Warren, C.J.); but see, Williamson v. United States, 184 F. 2d 280 (2d Cir. 1950) (Jackson, Circuit Justice). A prediction of dangerousness, moreover, has been approved by this Court as a basis for imposing capital punishment, certainly the ultimate deprivation of liberty. Jurek v. Texas, supra, 428 U.S. at 274-276.

Testifying at trial, a judge of the New York Family Court stated (JA:

598-599): "[I]n my experience in New York City, we do have situations where, if for no other reason but for the protection of the community, we must have some means in certain cases for detention." FCA, section 739(a)(ii), which is "designed to avoid any routine detention of a child" (Committee Comments to section 739, Book 29A, McKinney's Con. Laws of N.Y., p. 619), recognizes that need and does so with due regard for the rights of juveniles.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of the appeal.

January 24, 1983.

Respectfully submitted,

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